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# Social Security—Material Participation by Farm Owners

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## SOCIAL SECURITY — MATERIAL PARTICIPATION BY FARM OWNERS

### I. INTRODUCTION

A comparatively new area of social security law is that dealing with "material participation" by farm owners. The concept is designed to extend benefits to farm owners who, although operating their farms under what are technically lease arrangements, yet share in the management of the farm. The purpose of this article is to examine the statute and cases arising thereunder, and thus attempt to determine what is required to meet the test of material participation. In addition, it will examine the policy reasons supporting recent decisions, especially those dealing with participation through an agent. Also, consideration will be given to the advantages and disadvantages of this form of qualification for social security benefits as compared to partnership arrangements.

### II. HISTORY

In 1950<sup>1</sup> coverage of the Social Security Act was extended to certain groups of self-employed individuals. The above extension has necessitated increased efforts to distinguish between investment income and that which is realized from a trade or business. This distinction is necessary because there has never been any attempt by the Social Security Act to cover those realizing income from investment property, but the trend has been rapidly approaching the goal of coverage for all people realizing income from their work or business.

Coverage was extended in 1954<sup>2</sup> to include farmers. Under this amendment, an exception was made as to income realized from rentals. Thus the line between income from a trade or business and income from investment property became important in the farming business. If the farm owner's arrangement with the occupant was found to be a lease, the income received from the land could *not* be counted toward social security coverage.

As a result of this amendment, a partner in the farming business was able to qualify so long as he lent sufficient capital to the

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<sup>1</sup> Social Security Act, 64 Stat. 502 (1950), as amended, 42 U.S.C. §411 (1958).

<sup>2</sup> Social Security Act, 68 Stat. 1055 (1954), as amended, 42 U.S.C. §411 (1958).

business to qualify as a partner, even though he performed no actual labor on the farm. Thus a person could obtain the minimum number of quarters of coverage under the act, and qualify for the Social Security benefits largely on the basis of his investment.

It was soon realized, however, that many landowners with lease arrangements took an active part in both the supervision and operation of the enterprise.<sup>3</sup> In recognition of this fact, Congress extended the coverage of the Social Security Act to include farmers who "materially participate" in the management of the farm under a lease arrangement.<sup>4</sup>

With this amendment, landowners were faced with the problem of changing lease arrangements with tenants so as to be either included under or excluded from the operation of the act, depending upon their particular situations. Farmers nearing retirement age could now change old leases to arrangements providing for their material participation in the management of the farm. Since a rather small number of quarters of coverage is required to obtain a "fully insured" status, the form of the lease could be changed for this minimum number of quarters, and then be changed back to a simple leasing arrangement. Under present standards this means that one may change the lease for three or four years,<sup>5</sup> and then return to the previous form of lease and still be assured of obtaining full benefits.

In addition, the amendment created the danger that certain people who were already drawing social security benefits might be deprived of them or at least have them reduced if a lease were interpreted as a material participation arrangement.<sup>6</sup> For example, if one leased his farm under an arrangement which he thought was a simple lease arrangement, but was later found to be a "material participation" form of lease, the income would then be computed as income from a trade or business, thus increasing his

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<sup>3</sup> *Foster v. Flemming*, 190 F. Supp. 908 (N.D. Iowa 1960); *Bridie v. Ribicoff*, 194 F. Supp. 809 (N.D. Iowa 1960), in which the court stated "[T]he amendments were an apparent recognition by Congress that many farm landlords employ a method of 'leasing' their farms whereby they share with the tenant the elements of production in ways often involving substantial personal contributions to the farming operation by the landlord." *Id.* at 811.

<sup>4</sup> Social Security Act, 70 Stat. 824 (1956), 42 U.S.C. §411(a)(1) (1958).

<sup>5</sup> For present provisions see 75 Stat. 137 (1961), 42 U.S.C. §415 (Supp. 1961).

<sup>6</sup> See illustration in U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-25e 8 (1961). See also discussion in O'BYRNE, *FARM INCOME TAX MANUAL* §1123 (rev. ed. 1958).

"earned income" causing a reduction in the amount of benefits to which he was entitled.

The 1956 amendment included two major requirements for rental income to be considered as self-employment income: (1) that there be an actual arrangement by which the landlord is to share in the management of the farm, and (2) that the landlord "materially participates" in the management.<sup>7</sup>

The act is silent as to exactly what constitutes material participation.<sup>8</sup> This question has been left to the courts, and for regulation by the Social Security Administration.

### III. TESTS FOR DETERMINATION OF MATERIAL PARTICIPATION

The Social Security Administration has set forth the following tests, one of which must be met by the landlord to qualify for benefits under the act:

- (1) Do any three of the following:
  - (a) Inspect the production activities periodically.
  - (b) Advise and consult with your tenant periodically.

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<sup>7</sup> Social Security Act, 70 Stat. 824 (1956), 42 U.S.C. §411(a)(1) (1958), "There shall be excluded rentals from real estate . . . except that the preceding provisions of this paragraph shall not apply to any income derived by the owner or tenant of land if (A) such income is derived under an arrangement, between the owner or tenant and another individual, which provides that such other individual shall produce agricultural or horticultural commodities . . . on such land, and that there shall be material participation by the owner or tenant in the production or the management of the production of such . . . commodities, and (B) there is material participation by the owner or tenant with respect to any such commodity. . . ."

<sup>8</sup> See, however, the report of the Finance Committee, in which many of the tests later adopted by the Social Security Administration, were mentioned: S. REP. NO. 2133 at 38, 84th Cong., 2d Sess. 1 (1956).

"Under this amendment it is contemplated that the owner or tenant of land which is used in connection with the production of agricultural . . . commodities must participate to a material degree in the management decisions or physical work relating to such production in order for the income derived therefrom to be classified as 'net earning from self-employment.' The committee is of the opinion that in any case in which the owner or tenant establishes the fact that he periodically advises or consults with such other individual as to the production of the commodities and also establishes the fact that he periodically inspects the production activities on the land he will have presented strong evidence of the existence of the degree of participation contemplated by the amendment. If the owner or tenant also establishes the fact that he furnishes a substantial portion of the machinery, imple-

- (c) Furnish at least half the tools, equipment, and live stock used in producing the crop.
- (d) Advance, pay, or stand good for at least half the direct costs of producing the crop.
- (2) Regularly and frequently make, or take an important part in making management decisions substantially contributing to or affecting the success of the enterprise.
- (3) Work 100 hours or more spread over 5 weeks or more in activities connected with producing the crop.
- (4) Do things which, considered in their total effect, show that you are materially and significantly involved in the production of the farm commodities.<sup>9</sup>

The courts have frequently been called upon to determine the degree of participation required by test 1<sup>10</sup> dealing with sharing production costs, and inspection of production activities, and test 2<sup>11</sup> dealing with important management decisions. As a result of these court decisions, certain guides have been determined which lawyers may use in making certain that their clients are materially participating.

While there is certainly no requirement that the arrangement providing for the landlord's participation be in writing, as a matter

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ments, and livestock used in the production of the commodities or that he furnishes, or advances, or assumes financial responsibility for a substantial part of the expense . . . involved in the production of the commodities, the committee feels that he will have established the existence of the degree of participation contemplated by the amendment."

<sup>9</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-33d 5 (1961).

<sup>10</sup> *Reed v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. §8837 (N.D. Ind. 1960) (claimant shared costs of supplies, consulted with tenant as to production activities, and inspected farm regularly); *Ewing v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. §14,151 (D. Neb. 1961) (inspected crops and consulted with tenant, but claim disallowed because claimant provided no substantial part of production costs).

<sup>11</sup> *Wifstad v. Ribicoff*, 198 F. Supp. 198 (D.N.D. 1961) (provided part of costs of production in addition to certain management decisions, but probably not enough to amount to a "substantial part" thereof); *Conley v. Flemming*, 190 F. Supp. 906 (S.D. Cal. 1960) (test met where most of decisions related to farm plan); *Hoffman v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. §14,084 (E.D. Mo. 1960) (claim rejected because decisions aimed at increasing investment rather than production); *Musser v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. §9066 (W.D. Mo. 1960) (decisions relating to farm policy insufficient); *Sanderson v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. §14,141 (D. Ariz. 1961) (visited farm only once during year, and decisions not of major importance).

of proof it is advisable that the arrangement be written.<sup>12</sup> If the agreement is oral, there is always the possibility that the court may find the acts of the landlord to be wholly voluntary, whereby nothing which the landlord performs in accordance with the terms of the oral arrangement will be counted toward material participation.<sup>13</sup>

In addition to a written agreement providing for the material-participation lease, it may also be advisable to keep records as to the actual acts of participation by the landlord. In case the landlord should die there may be some benefit to the widow in proving material participation of her husband for the purposes of obtaining widow's benefits through her husband's income.<sup>14</sup>

In attempting to meet one of the tests for material participation, it should be understood that consultation and advice under test 1(b) is not the same as making decisions under test 2—the former being a much easier requirement to meet.<sup>15</sup> Under both tests, it is neces-

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<sup>12</sup> *Hicks v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. §14,406 (N.D. Ill. 1961). See also O'BYRNE, FARM INCOME TAX MANUAL §1108 (rev. ed. 1958).

<sup>13</sup> *Hicks v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. §14,406 (N.D. Ill. 1961). In this case the court found claimant's participation to be wholly voluntary where he worked 30 days a year and provided half of production costs. Decision was based largely on admission of claimant that his work on the farm was not part of the agreement.

<sup>14</sup> Where the wife must prove her deceased husband's participation under the lease, there would seem to be considerable question about the admissibility of such records, however, under the hearsay rule. It is quite doubtful if such records are within the "business records" exception to the hearsay rule. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109 (1943), in which the court refused to admit a report of an accident by a railroad engineer, in a suit against the railroad. The court stated that the primary utility of the report was in "litigating, not in rail-roading."

In the case of records kept to prove actions under the Social Security Act, the same problem seems to present itself. It is likely that the court would find that such records are not those kept in the normal course of business. Thus, the main purpose in keeping such records would be proof in any subsequent litigation.

One possible solution to such a problem would be to make the recording of such acts part of the landlord's participation in operating the farm under the lease agreement. Another would be to make certain that the landlord's wife actually witnessed some of the farming operations so that she would be testifying from personal knowledge rather than from what her husband has told her, or from records recorded by him.

<sup>15</sup> See explanation in U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-33d 4, 6 (1961). For distinction between tests, see *Pfeifer v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. § 14,082 (N.D. Ind. 1961), in

sary that the decisions relate in some way to production, but the materiality or impact of the topics to be discussed under test 1(b) probably need not be as great as that under test 2.<sup>16</sup> Test 2 requires the decisions to be ones "substantially contributing to or affecting the success of the enterprise." Since the purpose of the "enterprise" is the production of the crops for a particular year, the decisions must necessarily be those connected with this production.<sup>17</sup>

In *Musser v. Flemming*<sup>18</sup> the court rejected a claim for benefits because the decisions of the landlord related to general policy in the operation of the farm rather than to crop production for the particular year. As a result, the decisions of the landlord were not of the type required to satisfy test 2.

In another case<sup>19</sup> the court referred to such decisions affecting the general policy as the "farm plan." Such decisions of the landlord are aimed primarily at preserving fertility of the soil and maintaining the investment in the farm. They are not aimed at increasing production of the crops in any particular year.

The Ninth Circuit, however, seemingly rejected this distinction between decisions relating to production and those made in pursuance of the "farm plan," in *Conley v. Flemming*.<sup>20</sup> Here, the claimant was the owner of a grain farm. He made decisions concerning crops to be planted, what fields were to be fallowed, and visited the farm twice a year. It was the contention of the Social

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which claimant had an oral agreement with her son-in-law to farm claimant's farm. Claimant furnished half of various production costs, and also frequently consulted with tenant concerning various farm problems. Since most of the actual decisions were made by the tenant, the court found that claimant had not materially participated. If the court would have found such participation to have amounted to decisions rather than consultation, there would have been material participation.

<sup>16</sup> Test 2 requires the management decisions to be those substantially contributing to the success of the enterprise. Compare this with the statement regarding test 1(b) that the tenant need only discuss "what, where, when, or how things are to be done in producing the commodities." U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-33d 5 (1961).

<sup>17</sup> See *Musser v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. § 9066 (W.D. Mo. 1960); *Tyner v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. § 8879 (W.D. Okla. 1960).

<sup>18</sup> 1 CCH UNEMPLOYMENT INS. REP. § 9066 (W.D. Mo. 1960).

<sup>19</sup> *Tyner v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. § 8879 (W.D. Okla. 1960).

<sup>20</sup> 190 F. Supp. 906 (S.D. Cal. 1960).

Security Administration that these acts of supervision related only to the "farm plan" and were insufficient to constitute material participation. The court, however, held that where determination of the "farm plan" at the beginning of the year also included many of the final decisions relating to production, the time of making these decisions was not of importance.

On the basis of the *Conley* case, it seems that a distinction as to the type of decisions necessary for material participation may be drawn between grain producing farms and farms engaging in diversified production.<sup>21</sup> Since there are fewer production decisions necessary on a wheat farm after the crop has been planted, decisions as to the "farm plan" will usually be sufficient to meet test 2 above.

It is suggested that such a distinction between types of farming is almost a necessity if owners of grain farms are to be given an equal opportunity for coverage under the Amendment. Since so few decisions may be made after planting, a contrary holding would make it extremely difficult for such landowners to meet test 2.

Test 3, providing for physical activities on the part of the landowner, seems to raise no serious problems of interpretation and should raise only a question of fact for determination by the referee or jury. In meeting test 3, it should be remembered that *any* work is not sufficient, but such work must be "connected with producing the crop." A Social Security Administration pamphlet states that "Your work does not have to be doing the actual plowing, hoeing, or other farm labor. It may be making purchases, keeping records, caring for livestock, or repairing buildings, fences, and farm equipment used in connection with the production of the crop."<sup>22</sup>

In *Nichoalds v. Flemming*,<sup>23</sup> the claimant had made several trips to visit the farm and repair the premises. His claim was rejected, however, since his activities were not connected with production, but only with maintaining capital assets of the farm.

Not much need be said of meeting test 4, relating to the total effect of various participation activities which were insufficient to meet one of the first three tests. Here, all will depend upon the discretion of the court in each particular case. In setting up a farm management arrangement, it would seem wise not to rely on an arrangement comprised of parts of the other three tests, but to at-

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<sup>21</sup> See also *Wifstad v. Ribicoff*, 198 F. Supp. 198 (D.N.D. 1961).

<sup>22</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-33d 7 (1961).

<sup>23</sup> 1 CCH UNEMPLOYMENT INS. REP. § 9108 (E.D. Ill. 1961).



tempt to meet all of the requirements of one of the first three tests. There are at least certain rules to guide one in attempting to meet one of the other tests, but here one can not be certain that there has been sufficient participation in the management, until his particular case is litigated.

#### IV. MANAGEMENT THROUGH AN AGENT

One of the most controversial issues arising under construction of the material participation amendment has been that of participation through an agent. In several recent cases<sup>24</sup> the question arose whether material participation included only those acts of supervision or management personally undertaken by the landlord or whether it also included managerial participation and decisions made by some agent of the landlord.

The Social Security Administration maintained that material participation included only those acts of management personally undertaken by the landlord, and that no such acts through an agent were sufficient to fulfill the requirement. The courts, however, reached opposite results in all of the cases.

In *Henderson v. Flemming*,<sup>25</sup> the claimant, who leased her farm to sharecroppers, sought to bring herself within the scope of the Social Security Act by material participation through her son. The son, under a contract between claimant and the sharecroppers, did a substantial amount of the actual farming, plowing the ground, and planting the crops. There was no substantial question raised but that the arrangement called for sufficient participation if such work had been carried on personally by the claimant. The district court held that such participation through an agent was not sufficient to meet the test of material participation. In reversing, the circuit court stated that the arrangement was a joint venture between the owner and "so-called tenant." Thus the owner, as well as the tenant, is engaged in the occupation of farming. From this it follows that the case is the same as any other self-

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<sup>24</sup> See *Foster v. Celebreeze*, 1 CCH UNEMPLOYMENT INS. REP. §14,791 (8th Cir. 1963); *Hoffman v. Ribicoff*, 305 F.2d 1 (8th Cir. 1962); *Harper v. Flemming*, 185 F. Supp. 14 (E.D.N.C. 1960), *affirmed* 288 F.2d 61 (4th Cir. 1961); *Henderson v. Flemming*, 283 F.2d 882 (5th Cir. 1960); *Maxwell v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. §14,426 (N.D. Ala. 1962).

<sup>25</sup> 283 F.2d 882 (5th Cir. 1960).

employment business, and it may likewise be carried on through an agent.<sup>26</sup>

*Harper v. Flemming*<sup>27</sup> was similar to the *Henderson* case. The claimant attempted to qualify for social security benefits through income from a farm which was managed by a bank as her agent. The court, relying on *Henderson*, held that the claimant's participation through the bank's management was sufficient to bring her within the coverage of the act. In *Maxwell v. Ribicoff*,<sup>28</sup> which was almost indetical in its facts to *Henderson*, the court merely relied on that case in reaching a similar decision.

In two other cases involving the agency relationship, the claims were rejected, but only because there was insufficient participation in the management, either with or without the agent's participation. In the first, *Foster v. Flemming*,<sup>29</sup> the claimant had employed a farm management company to make certain management decisions in her lease with the tenants. The court found it unnecessary to consider the agency question in view of the fact that these management decisions were not sufficient to constitute material participation.

In the other case, *Hoffman v. Ribicoff*,<sup>30</sup> the court held that it is not sufficient vicarious participation for the agent (in this case a brother-in-law of the claimant) merely to look after the claimant's interest, to see that the work is carried on as directed by the claimant, where the claimant's own participation was not sufficient to meet one of the tests of participation.

In its latest rulings the Social Security Administration adopts the *Henderson* view that a landlord may qualify for benefits on the basis of management decisions through an agent.<sup>31</sup>

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<sup>26</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY HANDBOOK, OASI-135 § 1003 (1960).

<sup>27</sup> 288 F.2d 61 (4th Cir. 1961).

<sup>28</sup> 1 CCH UNEMPLOYMENT INS. REP. § 14,426 (N.D. Ala. 1962).

<sup>29</sup> 190 F. Supp. 908 (N.D. Iowa 1960). This case was recently reversed, however, by the Eighth Circuit. *Foster v. Celebrezze*, 1 CCH UNEMPLOYMENT INS. REP. §14,791 (8th Cir. 1963). The court here reviewed the case in view of the *Harper* and *Henderson* decisions and found that the lease provided for material participation where the tenant had a duty "to put such crops in such manner as the landlord may direct." The court found that there was sufficient participation through the agent, a farm management company.

<sup>30</sup> 305 F.2d 1 (8th Cir. 1962).

<sup>31</sup> S. S. Rul. 62-16; See illustration in 1 CCH UNEMPLOYMENT INS. REP. § 14,199 (1962).

The material participation amendment<sup>32</sup> and the discussion of the bill in the Senate Finance Committee<sup>33</sup> are silent on Congressional intent with respect to the agency situation. An inference of this intent, however, may be found in a statement of the Senate Finance Committee: "Your committee has consistently held the view that the coverage of the program should be as nearly universal as practicable."<sup>34</sup>

From available case law, it is apparent that the courts have given a very liberal construction to the provision in order to effect this purpose of making coverage universal.<sup>35</sup> It is suggested that the entire area of participation through an agent places an unwarranted emphasis on form, and is a more liberal interpretation than required by the committee reports or the statute itself. As was stated earlier, this amendment was a recognition that many farmers who operated their farms through a leasing arrangement took an active part in the supervision and operation of the farm. Under present interpretation, the landowner is able to remove himself two steps from the actual labor and production operations and yet qualify for benefits. He may revise old lease arrangements merely by taking away from the tenant the right to make certain management decisions and placing such right in the hands of a third party, and still qualify for Social Security benefits. Yet, it seems quite possible that the landlord under such an arrangement may make none of the decisions relating to production. Thus the landlord, in effect, is doing nothing that he would not do under a typical lease arrangement. Where the agency situation is not presented, the courts frequently deny the claims because the decisions of the owner are primarily aimed at preserving the fertility of the soil, or maintaining the capital assets of the farm, rather than in obtaining production.<sup>36</sup> It is submitted that such would almost always be the case where an agent was appointed by the landowner with complete authority to make decisions. It is thus suggested that

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<sup>32</sup> Social Security Act, 70 Stat. 824 (1956), 42 U.S.C. § 411(a) (1) (1958).

<sup>33</sup> S. Rep. No. 2133, 84th Cong., 2d Sess. 1 (1956).

<sup>34</sup> *Ibid.*

<sup>35</sup> For what is probably the most liberal view taken by any court in construing the amendment, see *Vance v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. § 14,427 at 2380 (E.D. Tenn. 1961), in which the court stated, "Finally, although not determinative of the case, we are constrained to observe that it is shoddy business for one branch of the Federal Government to retain taxes paid on the premises that the taxpayer *was* self-employed, while another denies social security benefits on the premise that taxpayer *was not* self-employed.

<sup>36</sup> See notes 16 and 17 *supra*.

if agency participation is to be allowed, the arrangement between the landlord and agent should be closely examined to determine the amount of consultation required between them before the farm policy is decided. For if the agent is allowed to make the decisions as well as relate them to the tenant, it is impossible to distinguish income from this source and income from rental property. It is suggested that if the court finds the agent to have made the actual decisions, the income should not be counted toward the required number of quarters of coverage. This would be in accord with the purpose of the act to distinguish between income from a trade or business and income from rental property.

## V. CONSIDERATIONS IN DRAFTING LEASES

With the above discussion in mind, a few rules can be elucidated which should be of some help in drafting a lease providing for material participation. Of course, which of the four tests a landlord will wish to meet will vary with each individual owner and his particular situation. For example, a person who has recently given up farming for himself, and still owns his farm machinery and equipment, would likely wish to qualify under test 1, dealing with sharing of production costs, and inspection activities, since he would already be meeting one part of the test. An active person might prefer to qualify through personal labor under test 3.

Most of the drafting problems would seem to lie in meeting one of the first two tests. In meeting test 1, inspection of production activities and advising and consulting with the tenant will provide the major questions for the courts. The frequency of the inspection will vary, of course, with the particular type of farming activities.

In an arrangement which provides for advice and consultation on the part of the landlord, it is not necessary that the tenant be bound to accept such suggestions. It is only necessary that the landlord meet with the tenant periodically and discuss "what, where, when, or how things are to be done in producing the commodities."<sup>37</sup> Such advice or consultation will not count toward material participation, however, if it relates only to repair of buildings, fences or other improvements.

The section of test 1 providing for inspection also must be in connection with the production of crops. The frequency of such inspections will depend upon the size and type of farm.<sup>38</sup>

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<sup>37</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE OASI-33d 5 (1961).

<sup>38</sup> *Ibid.*

In meeting the other two parts of the first test (standing good for a significant part of the costs of production, or furnishing a significant part of the tools, equipment, and livestock), the tests are undoubtedly met if the "significant part" amounts to half the total. In some cases, where enough other elements of material participation are present, a lesser amount may be sufficient to meet these parts of the test. The problem area seems to lie in cases where the landlord has furnished one-fifth to one-half the costs of production. It is the position of the Social Security Administration that less than one-fifth would never be sufficient.<sup>39</sup>

In meeting test 2 (which calls for the landlord to make regular and frequent decisions) deciding what crops and livestock to raise, where to plant crops, and what land to leave idle is not sufficient to meet the test. As shown by previously mentioned cases,<sup>40</sup> this is determination of the "farm plan", and does not significantly affect the production for a particular year. "Decisions that count would be when to plant, cultivate, dust, spray, or harvest the crop, what goods to buy, sell, or rent, what farming standards to follow, what records to keep, when and how bills are to be paid, etc."<sup>41</sup> While it is not necessary that the landlord make all necessary decisions affecting production, he must make a substantial part of them to meet this test.<sup>42</sup>

The final two tests would seem to require little analysis. Test 3, dealing with personal labor on the part of the landlord, is self-explanatory, and the only problem is to be certain that the work provided for in the lease arrangement is in connection with production. Such work as repair of buildings ordinarily would not be sufficient. But work not of a manual nature, such as making purchases and keeping records, may be counted toward meeting the test.<sup>43</sup> In addition, the suggestion made earlier that all such arrangements for material participation should be in writing applies with perhaps greater force in relation to this test than any other.

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Wifstad v. Flemming*, 198 F. Supp. 198 (D.N.D. 1961); *Tyner v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. § 8879 (W.D. Okla. 1961).

<sup>41</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-33d 6 (1961).

<sup>42</sup> *Wifstad v. Ribicoff*, 198 F. Supp. 198 (D. N.D. 1961); *Conley v. Flemming*, 190 F. Supp. 906 (S.D. Calif. 1960).

<sup>43</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OASI-33d 7 (1961). See also *Nicholds v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. § 9108 (E.D. Ill. 1961).

Of all the approved means of participation, the courts would most likely find work to be voluntary in nature.<sup>44</sup>

In drafting leases, qualification under the final test (dealing with the total effect of the landlord's activities) should be avoided if possible. Normally the court would consider this test if the arrangement fails to meet one of the other tests, but such arrangement contains some of the factors of two or all three of the earlier tests. Under these circumstances the court may feel that in its total effect the arrangement constitutes material participation.

This test may also allow the Social Security Administration to bring landowners within the scope of the Act where they have no desire to be covered, for fear of having present benefits reduced. For this reason the landowner who does not wish to be within the Act must be careful not to have too many elements of the first three tests in the lease, even though none of these tests are completely met.

#### VI. FARM PARTNERSHIPS— AN ALTERNATIVE ARRANGEMENT

A farming arrangement differing little in actual form from a lease providing for material participation (especially the share-crop lease)<sup>45</sup> is the partnership arrangement. For this reason, farmers should be advised to consider forming a partnership when attempting to reach a plan which will entitle them to Social Security benefits. In a valid partnership, it is not necessary for the inactive partner to participate in management of the farm. Even if the court holds the attempt to create a partnership to be ineffective,

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<sup>44</sup> See *Hicks v. Ribicoff*, 1 CCH UNEMPLOYMENT INS. REP. § 14,406 (N.D. Ill. 1961).

<sup>45</sup> See Eckhardt, *A Farm Partnership with Suggestions As to How to Obtain Social Security Coverage for "Retired" Farmers*, 28 WIS. BAR BULL. 9, 12 (Dec. 1955). "It is my belief that many of the arrangements existing between father and son—with nothing but an oral agreement to support them—are presently partnership arrangements."

The author continues by stating: "Exactly what is required in order to create a partnership is uncertain but usually some of the following features will exist: Losses will be shared by both parties, profits will be shared by both parties, both parties will be responsible for the debts of the partnership, the parties will hold themselves out as partners, there will be a business bank account, each of them will have some authority to make decisions regarding the management of the farm. Many of these features will be found in most existing oral arrangements; it is not necessary that all of them be present."

The author also sets forth a form for a partnership for a farm family at p. 12.

there still may be a possibility of obtaining coverage by proving material participation on the part of the landlord.<sup>46</sup>

The Social Security Regulations provide that an inactive or limited partner receives self-employment income from the partnership business.<sup>47</sup> So while a limited partner is unable to participate in the business and eliminates many of the partnership risks, his share is still self-employment income.

There are conceivable situations in which the farm partnership might be better adapted for the purposes of obtaining Social Security coverage than would a material-participation lease.<sup>48</sup> This is especially true in father-son arrangements, where there is no objection to the son's handling of important policy matters, and the father no longer wishes to actively participate in the management of the farm.

## VII. CONCLUSIONS

In general, the courts have given a liberal construction to the amendment in order to carry out the purpose of the program—making coverage as nearly universal as practicable. A liberal construction, however, may be disadvantageous to certain groups who wish to avoid coverage, *e.g.*, those who are already obtaining Social Security benefits, but also have income from farm property. To obtain full benefits, these farmers must not earn over a certain maximum wage. Yet, these same farmers may wish to participate to a limited extent in the management of the farm. Under present interpretation of the statute, however, they must refrain from making any agreement which might be interpreted as a material participation arrangement, or risk a reduction in the Social Security benefits that they are presently receiving.

The material participation amendment, and the courts' liberal interpretation of the amendment appear to place a premium upon

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<sup>46</sup> O'BYRNE, FARM INCOME TAX MANUAL § 1108 (rev. ed. 1958).

<sup>47</sup> S. S. Reg. § 404.1051.

<sup>48</sup> See O'BYRNE, FARM INCOME TAX MANUAL § 1108 at 509 (rev. ed. 1958). "The partnership is far and away the best device for farm landowners in their Social Security problems. A true partnership produces self-employment income . . . but there is no reduction of benefits if no substantial services are rendered. What is a better arrangement to show the absence of services than a limited partnership in which the rendering of services is prohibited by law? Even in a general partnership, the burden of showing the absence of services is surely no greater than showing the withdrawal from activity of a landowner who qualified under a material participation lease."

the form of the arrangement between landlord and tenant. While this is not in accord with the prevailing doctrine of tax law that the court will look beyond the mere form to discover the real substance of arrangements,<sup>49</sup> much of this liberality can be justified by policy reasons.

In the Social Security area, the policy and purpose of the statute favor extending coverage, and there is no strong objection to arrangements which have as a substantial purpose bringing the person within the scope of the act.

In spite of this emphasis on form, the courts have, in severe cases, occasionally looked beyond the outward appearance in striking down attempts to create partnerships and corporations for purposes of accumulating benefits under the Social Security Act.<sup>50</sup>

There is some question as to how far the Social Security Administration will go in depriving landlords, presently drawing Social Security, of full benefits where they are participating in the management of the farm, but do not wish to have the returns classified as self-employment income. As yet no cases have arisen in connection with material participation in which benefits have been reduced as a result of claimant's present earnings. There have been cases involving other businesses,<sup>51</sup> and such decisions are certain to spread to the farm situation.

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<sup>49</sup> See, e.g., *Commissioner v. Culbertson*, 337 U.S. 733 (1949).

<sup>50</sup> *Howatt v. Folsom*, 253 F.2d 680 (3rd Cir. 1958) (corporation was formed solely to hire father of owner so that he might qualify for benefits); *Chipman v. Ribicoff*, 196 F. Supp. 94 (S.D. Fla. 1961) (partnership revived for sole purpose of obtaining required number of quarters); *Stark v. Flemming*, 181 F. Supp. 539 (N.D. Cal. 1959) (claimant contributed all assets to corporation and then hired out as its president).

There is some indication of a contrary view in *Enke v. Ribicoff*, 197 F. Supp. 319 (S.D. Fla. 1961), in which claimant and wife formed a corporation for sole purpose of obtaining benefits under the act. The corporation was discontinued after the required number of quarters were obtained. The court stated: "[T]here is nothing improper or questionable about a person entering a bona fide employment relationship for the express and even admitted purposes . . . of acquiring a wage record which would enable him to qualify for old age insurance benefits. Such action is clearly within the letter and spirit of the Act." *Id.* at 324.

<sup>51</sup> See *Asher v. Folsom*, 1 CCH UNEMPLOYMENT INS. REP. § 8265 (N.D. Cal. 1956) (attorney managing loan activities and holding himself out to make real estate loans); *Berkley v. Folsom*, 1 CCH UNEMPLOYMENT INS. REP. § 8203 (E.D. Va. 1957) (working part time keeping books and receiving \$240 per month "retirement pay"—"retirement pay")



Instead of construing the amendment so liberally as to work a hardship on those already obtaining benefits, the courts should attempt to reach a balance which would protect the interest of both those wishing to obtain coverage, and those wishing to participate to a limited extent in management of the farm, but yet not be subject to the act.

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found to constitute wages); *Wilson v. Folsom*, 151 F. Supp. 195 (D.N.D. 1957); *Heretick v. Flemming*, 1 CCH UNEMPLOYMENT INS. REP. § 14,086 (E.D. Va. 1960).